APR 1981

CASE NO. 80-1600

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1981

JOHN H. HOLMES

Petitioner,

v.

UNION GOSPEL PRESS and STATE OF OHIO,
OHIO BUREAU OF EMPLOYMENT SERVICES

Respondents.

ON APPEAL FROM
THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

On or about June 20, 1977, James H. Holmes, hereinafter referred to as the claimant/appellant, began working for the Union Gospel Press, 2000 Brookpark Road, Cleveland, Ohio. The Union Gospel Press is a subsidiary of the Gospel Worker's Society, a church group, which is a non-profit corporation engaged in missionary work. Under the unemployment compensation laws of the State of Ohio, employees of non-profit religious associations are not eligible for unemployment benefits unless the non-profit religious association has elected to be covered.[1] The Union Gospel Press, at the time in question, has not elected coverage.

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1. Sections 4141.01(X), 4141.01(B)(3)(1) and 4141.241, Ohio Revised Code.

On February 17, 1978, the claimant became separated from his employment with the Union Gospel Press and filed a claim for unemployment with the Union Gospel Press and filed a claim for unemployment compensation benefits. On March 29, 1978, a "Determination of Application for Benefit Rights" was mailed to the claimant informing him that his claim for benefits was being disallowed because his employer had not elected to be "covered" by the unemployment insurance laws of Ohio. The claimant requested "Reconsideration" and, on April 14, 1978, the Administrator's Decision on Reconsideration was mailed to the claimant's last known post office address. This decision *was received* by the claimant, although he chose not to acknowledge it. (R 31) The claimant thereafter attempted to appeal to the Unemployment Compensation Board of Review by filing a Notice of Appeal on May 3, 1978. Under Section 4141.28(H), Ohio Revised Code, the Appellant's appeal was untimely.

A hearing was held on May 31, 1978 before Boris Rakowsky, a duly appointed referee of the Unemployment Compensation Board of Review wherein the question of timeliness of appeal was considered. At this hearing, the claimant did not raise or allude to any constitutional issue. On June 2, 1978, Referee Rakowsky issued a decision holding that the claimant's appeal to the Board of Review from the Administrator's decision on Reconsideration had been untimely filed and that the Board of Review therefore lacked jurisdiction to hear the appeal.

The claimant, through counsel, requested further appeal to the Board of Review. The claimant's request for further appeal likewise did not attempt to raise a constitutional issue. On July 12, 1978, the Board of Review disallowed further appeal.

On or about July 24, 1978, the claimant, through counsel, filed an appeal to the Common Pleas Court of Medina County. The claimant's July 24, 1978 Notice of Appeal similarly failed to raise a constitutional issue.

On July 30, 1979, Judge Phillip A. Baird held that the decision of the Board of Review in the instant case was not unreasonable, unlawful, or against the manifest weight of the evidence and affirmed the Board's decision.

On August 28, 1979, a Notice of Appeal to the Court of Appeals was filed by the claimant and, on December 28, 1979, the Court of Appeals affirmed the decision of the Common Pleas Court. Thereafter, the claimant moved to amend his brief to include the case of **Adams v. Giles**, 60 Ohio App. 2d 351 hereinafter referred to as **Adams** and, on January 14, 1980, moved for certification of conflict.

On March 24, 1980, the instant case was certified to the Ohio Supreme Court as in conflict with judgments of the Court of Appeals of the Fifth District in **Mable J. McCruter v. Board of Review, et al.**, Richland Co., No. 1828 (reversed 64 Ohio St. Ed. 277) and the **Adams** case, *supra.*

1. THIS COURT LACKS JURISDICTION TO REVIEW STATE COURT DECISIONS RESTING ON ADEQUATE STATE GROUNDS.

In the case of **Herb v. Pitcairn**, 324 U.S. 117 (1954) Justice Jackson, speaking for the Court stated that this Court has, from the time of its foundation, adhered to the principle that it will not review judgments arising out of the state courts which rest on adequate and independent state grounds. In more recent years, this Court has held that no review will lie where a party has merely failed to abide by a state procedural requirement because such matters are adequate state grounds. (See **Michigan v. Tyler**, 436 U.S. 499 (1978); **Parker v. North Carolina**, 397 U.S. 790 (1970).

In the instant case, the Appellant's case was dismissed because of his failure to follow the simply procedural requirements of Section 4141.28(H), Ohio Revised Code, in that his appeal to the Board of Review, Ohio Bureau of Employment Services was filed beyond the mandatory fourteen day period.

As stated in the section styled Statement of the Case, the decision of the Administrator upon reconsideration was mailed to the claimant on April 14, 1978; however, the claimant's appeal to the Board of Review was not received until May 3, 1978.

Section 4141.28(H) states:

> "(H) Any interested party may appeal the administrator's decision on reconsideration to the board and unless and appeal is filed from such decision on reconsideration with the board within fourteen calendar days after such decision was mailed to the last known post office address of the appellant such decision on reconsideration is final and benefits shall be paid or denied in accordance therewith."

2. THE PETITIONER LACKS STANDING TO RAISE A CONSTITUTIONAL ISSUE.

The petitioner would raise the question of the adequacy of notice; however, the undisputed evidence in the instant case establishes that the petitioner has no standing to make such an assertion.

In a long line of cases, this Court has established the doctrine that "justiciability", as required by the case or controversy language of Article III of the U.S. Constitution, will depend in part upon "standing". Although "standing" is an amorphous concept (**Flast v. Cohen**, 392 U.S. 83), it requires that the challenging party has been injured in fact by the challenged action. **Association of Data Processing Service Organizations, Inc. v. Camp** (1969) 397 U.S. 150, **Duke Power Co. v. Carolina Environmental Study Group, Inc.** (1978) 438 U.S. 59, **Simon v. Eastern Kentucky Welfare Rights Organization**, 426 U.S. 26.

In the instant case, the appellant would like to raise the question of the constitutionality of Section 4141.28(H) in a situation wherein the claimant does not receive a copy of the Administrator's decision on reconsideration; however, the facts in this case are otherwise. At page 6 and 7 of the transcript of the hearing before the Board of Review, the Appellant *admitted receiving* a copy of the decision of the Administrator. This court has traditionally held that where, under one state of facts, the operation of a statute is consitutional, this Court will not

declare it invalid because, under another state of facts, not involved, its operation may be challenged. See **Dahnke-Walher Milling Co. v. Bondurant**, 257 U.S. 282, 289, 42 S. Ct. 106.

3. THE INSTANT CASE INVOLVES A POLITICAL QUESTION.

It has been the policy of this Court for many years to avoid questions that might require the Court to impinge upon the prerogatives of other branches of government. **Baker v. Carr**, 369 U.S. 186, 210, 2S. Ct. 691. In the instant case, the executive branch of the Federal government has determined, through the Secretary of Labor, that states wishing to receive Federal tax credits for approved unemployment compensation programs adhere to certain time frames for the final disposition of cases. See 42 U.S.C. 503 and 20 C.F.R. 640.5. Under the Federal time lapse requirements, some final action must be taken on an Administrator's decision within fourteen days from the date on which it was rendered. To calculate the appeal time from the date of a claimant's receipt, or to hold all action in abeyance until receipt would mean that the Ohio Bureau of Employment Services could not comply with the time lapse provisions dictated by the Secretary of Labor.

4. THE INSTANT CASE INVOLVES QUESTIONS OF STATE'S RIGHTS.

In **Ohio Bureau of Employment Services v. Hodory**, 431 U.S. 471 (1977), this Court held that the States were free to formulate their own unemployment compensation programs subject only to the contractual provisions of 42 U.S.C. 503 concerning funding. Nothing in 42 U.S.C. 503 [2] requires that the States guarantee absolute notice to each and every claimant; therefore, the type of notice must be a function delegated to the States. Even under this Court's decision in

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2. It is interesting to note that even 42 U.S.C. 503 requires only "substantial compliance" with its standards.

Mullane v. Central Hanover Bank and Trust (1950) 339 U.S. 306, it was held that notice need only be "reasonably"calculated to apprise the parties of the pendency of the action. Therefore, absent some requirement of 100% absolute notice, the statute here involved, Section 4141.28(H), is not constitutionally infirm and no Federal challenge can be heard.

5. THE PETITIONER IS ATTEMPTING TO RAISE NEW ISSUES FOR THE FIRST TIME ON APPEAL.

In **Yakus v. United States,** 321 U.S. 414, this Court held:

> "No procedural principle is more familiar to this court than that a constitutional right may be *forfeit* in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

In the instant case, all of Appellant's arguments relating to the applicability of 42 U.S.C. 503 and the constitutionality of 4141.28(H), Ohio Revised Code were raised for the first time *on appeal* below. The petitioner utterly failed to raise any of these issues before the Board of Review or in his Notice of Appeal to the Common Pleas Court. He cannot now in good faith suggest that the Board of Review committed an error by not deciding an issue not raised before them.

CONCLUSION

It is respectfully submitted that the decision of the Ohio Supreme Court was correct and should be affirmed or, in the alternative, that the Appellant's appeal should be dismissed because of a lack of a substantial federal question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Certiorari of the State of Ohio was mailed to John C. Oberholtzer, counsel for Petitioner, P.O. Box J, Medina, Ohio 44256 and to Lester J. Farber, counsel for Respondent-employer, 1550 Leader Building, Cleveland, Ohio 44114 on this the _____day of April, 1981.

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